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No. 95-210

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

HOLLY FARMS CORPORATION;
TYSON FOODS, INCORPORATED,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

CHAUFFEURS, TEAMSTERS AND HELPERS,
LOCAL 391, 29, 71, 355, 592, 657, 988,
AND ALL AFFILIATED WITH THE
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Intervenor.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether Petitioners' chicken catchers, forklift drivers, and live haul drivers, who go to farms of independent growers, where they catch, cage, and load live chickens owned by Petitioners and deliver them to Petitioners' processing plant, are agricultural laborers within the meaning of 29 U.S.C. §§152(3) and 203(f) and therefore exempt from the National Labor Relations Act.

PARTIES TO THE PROCEEDING

The parties before this Court are those set forth in the caption.*

*Tyson Foods, Inc., is involved in a joint venture and/or partnership with Trasgo, S.A. DE C.V.; Offshore Systems, Inc.; Aleutian Fuel Services; Ucluelet Seafood Processors; Universal Plan Investments; and Shanghai Ocean Wealth Products Corporation. Tyson Foods, Inc., was the parent company of Holly Farms, Inc. There are no other parent companies or non-wholly-owned subsidiaries.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 48 F.3d 1360 (4th Cir. 1994). (Pet. App. 1).[1] The order of the National Labor

[1] References to the Joint Appendix are designated as "App." followed by the appropriate page number(s). References to the [footnote continued]

Relations Board is reported at 311 N.L.R.B. 273 (1993). (Pet. App. 79).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on March 10, 1995. The court of appeals entered an order denying Petitioners' Petition for Rehearing and Suggestion for Rehearing in Banc on May 9, 1995. Petitioners' Petition for Writ of Certiorari was filed on August 7, 1995. (App. 2a). The Court granted the petition, limited to question number five, on November 6, 1995. (App. 46a). The Court has jurisdiction under 28 U.S.C. §1254(1) (1993).

STATUTORY PROVISIONS INVOLVED

This case involves consideration of Section 2(3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §152(3) (1973), and section 3(f) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §203(f) (1978).

Section 2(3) of the NLRA, 29 U.S.C. §152(3), provides:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in the connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employer by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

Section 3(f) of the FLSA, 29 U.S.C. §203(f), defines "agriculture" as follows:

> "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

STATEMENT OF THE CASE

For many years, Petitioner Holly Farms Corporation ("Holly") has been engaged in the production and marketing of poultry products at various facilities throughout the United States, including Monroe and Wilkesboro, North Carolina; Glen Allen, Harrisonburg, and Temperanceville, Virginia; and Center and Seguin, Texas.[2] Its operations have included hatcheries, live haul operations,

Appendix to the Petition for Writ of Certiorari are designated as "Pet. App" followed by the appropriate page number(s).

[2]The stock of Holly was purchased by Petitioner Tyson Foods, Incorporated ("Tyson") on July 18, 1989. (Pet. App. 94).

feed mills, feed haul operations, maintenance facilities, processing plants, and transportation operations. (Pet. App. 227-229).

Holly is a vertically integrated poultry company. The process starts with female breeder hens referred to as pullets. Approximately eighty percent of the pullets are purchased from breeder companies. The remainder are produced by Holly. The baby pullets (one to two days old) are transported to the farms of independent growers who are under contract with Holly to raise the pullets. The baby pullets are unloaded at the farms by pullet service employees of Holly. The pullets are then grown by the independent grower to the age of twenty weeks. (App. 7a-9a).

Once the pullets reach the age of twenty weeks, they are caught and loaded on trucks and transported to laying houses by employees of Holly called pullet movers. The laying houses are owned by independent farmers. The pullets lay eggs, which are collected and placed into cartons by the independent farmer. The eggs are loaded on trucks and delivered to Holly's hatcheries by employees of Holly called egg haulers. Holly's hatchery employees place the eggs into setters, where the eggs are kept warm for a period of eighteen days. Holly's hatchery employees then take the eggs from the setters to incubators, where they are hatched. Once the eggs are hatched, the chicks are removed from the incubators, placed on conveyor belts, and carried to work stations at which the chicks are debeaked and vaccinated by employees of Holly. (App. 9a-12a).

On the same day that they are hatched, the broiler chicks are delivered by Holly employees ("chick delivery" employees) to the farms of independent farmers who are under contract with Holly to raise the chicks.

The broiler chicks are grown by the independent farmers until they reach the age of forty-nine days. When the chicks reach the age of forty-nine days, Holly's live haul crews go to the farms. These crews consist of a supervisor, nine chicken catchers, one forklift driver, and one live haul driver. The catchers manually catch the chickens and place them in cages. The caged chickens are loaded on the live haul trucks by the forklift operator. When the truck is full, the live haul driver delivers the chickens to the processing plant and then returns to the farm for additional loads. At the end of the shift, the live haul driver transports the live haul crew to Holly's processing plant. (App. 4a-5a, 12a-14a; Pet. App. 230-231 n.54).

When the live haul trucks reach the processing plant, the trailers on which the caged chickens have been loaded are attached to a "yard shuttle truck" by a Holly employee, who then transports the trailer either to a holding shed or to the processing plant receiving department. (App. 28a-29a). The chickens are subsequently processed and marketed.

Holly also operates a feed mill where it manufactures poultry feed. The feed is delivered by Holly's feed haul drivers to the independent broiler growing farms. The independent grower, however, actually does the feeding of the chicks. (App. 4a, 6a-7a).

On February 16, 1989, Chauffeurs, Teamsters and Helpers, Local Union Nos. 29, 71, 355, 391, 592, 657, and 988 (hereinafter collectively "the Union") filed a representation petition with the National Labor Relations Board ("NLRB" or "Board") seeking to represent "a unit comprised of all hatchery, live haul and feed haul employees . . . at [Holly's] Wilkesboro, North Wilkesboro, Hayes, Roaring River, Seacrest, Suncrest,

and Fairplanes, North Carolina facilities." (App. 19a). Pursuant to Section 9(a) of the Act, 29 U.S.C. §159(a), a hearing was held to determine the scope of the appropriate bargaining unit.

Over the objection of Holly that the live haul employees were agricultural employees not covered by the NLRA, the Board directed an election in the following bargaining unit:[8]

> All live haul employees (chicken catching crews) employed at the processing facility of the Respondents located at Wilkesboro, North Carolina and feed haul, feed mill and service center employees employed at the facility of the Respondents located in Roaring River, North Carolina, excluding all office employees, guards and supervisors as defined in the Act.

(App. 40a, 44a).

On July 27, 1989 an election was held in which the Union failed to receive a majority of the valid votes cast. The Union filed unfair labor practice charges with the Board alleging that Holly committed numerous violations of the NLRA during the Union's organizing activities. The Board's General Counsel issued an unfair labor practice complaint against Holly. The General Counsel alleged that Holly's unfair labor practices were so serious that the possibility of a fair rerun election was remote and requested that a bargaining order under the Court's decision in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), be issued on the basis of signed authorization cards.

---

[8]The Board agreed with Holly that Holly's hatchery employees, including egg haulers and pullet haulers, were exempt agricultural laborers. (App. 21a-22a, 43a).

The NLRB acquired jurisdiction under Sections 10(a) and (b) of the NLRA, 29 U.S.C. §§160(a) and (b). A hearing was held before Administrative Law Judge Robert M. Schwartzbart ("ALJ") beginning on November 27, 1989, and concluding on May 2, 1990. (App. 1a-2a).

The ALJ issued his decision on March 12, 1992. He concluded that Holly had engaged in a number of unfair labor practices during the organizational drive at the Wilkesboro facility, that Holly's unfair labor practices had made the possibility of a fair rerun election unlikely, and that a *Gissel* bargaining order should issue in the bargaining unit previously approved by the Board. (Pet. App. 785-817).

Holly filed timely exceptions to the ALJ's decision with the NLRB. On May 28, 1993, the Board issued its decision and order. The Board affirmed the ALJ's conclusions, in pertinent part, and specifically approved of the issuance of a *Gissel* bargaining order. (Pet. App. 147-156). The Board declined to reconsider the bargaining unit found appropriate in the prior representation hearing. (Pet. App. 83). Board Member Oviatt dissented from this part of the decision on the ground that Holly's live haul crews were agricultural employees excluded from the Act's coverage. Member Oviatt would have dismissed all allegations of the complaint that alleged violations with respect to the live haul workers. (Pet. App. 187-191).

On June 7, 1993, Petitioners timely filed a Petition for Review with the United States Court of Appeals for the Fourth Circuit. On July 19, 1993, the Board filed a Cross-Application for Enforcement of its Order. The court of appeals acquired jurisdiction pursuant to Sections 10(e) and (f) of the Act, 29 U.S.C. §§160(e) & (f).

On March 10, 1995, a panel of the court of appeals enforced the Board's order. Judge Niemeyer dissented in pertinent part because in his opinion, the chicken catchers, forklift drivers, and live haul drivers were agricultural employees exempt from coverage by Section 2(3) of the NLRA. (Pet. App. 38-61). The Court granted certiorari to resolve this issue. (App. 46a).

SUMMARY OF ARGUMENT

This case presents the single issue of whether the NLRB, as affirmed by the panel of the court of appeals, acted reasonably in holding that Holly's chicken catchers, forklift drivers, and live haul drivers were employees under §2(3) of the NLRA, rather than exempt agricultural laborers. Petitioners contend that the Board's conclusion is contrary to express statutory language, clear congressional intent, interpretations of the Secretary of Labor, and prior interpretations by the Court of the pertinent statutory language. Accordingly, the Board's conclusion is not entitled to deference and should be rejected. *E.g., Lechmere, Inc. v. NLRB,* 502 U.S. 527, 537 (1992); *Dole v. United Steelworkers of America,* 494 U.S. 26, 42 (1990); *Board of Governors of the Federal Reserve Sys. v. Dimension Fin. Corp.,* 474 U.S. 361, 368 (1986); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-843 (1984); *American Ship Bldg. Co. v. NLRB,* 380 U.S. 300, 318 (1965). Rejection of the Board's conclusion that the live haul employees are not exempt agricultural laborers mandates the rejection of all unfair labor practices directed at live haul employees, as well as the *Gissel* bargaining order.

Section 2(3) of the NLRA, specifically exempts "any individual employed as an agricultural laborer" from

the statutory definition of "employee." Since 1946, in riders to the Board's appropriation acts, Congress has directed the Board to look to §3(f) of the FLSA, in determining whether an individual is an agricultural laborer.

The plain language of §3(f) defines the term agriculture to include raising poultry, harvesting agricultural commodities, and engaging in any practices by a farmer or on a farm that are incidental to or in conjunction with the farming operations of the farmer or the farm. Rather than give this language its natural meaning, the Board has, by administrative fiat, interpreted §3(f) in a manner which excludes the activities of all nonfarmers, no matter how related the activities are to agriculture.

The Board's interpretation ignores the express language of §3(f), which provides that agriculture includes "harvesting" of "agricultural commodities" and that "preparation for market" and "delivery to storage or market" are practices that are incidental to farming practices. The Board's interpretation ignores extensive contemporaneous legislative history demonstrating that independent businesses, which perform farming practices on farms, are within the agricultural exemption. The Board's interpretation ignores interpretations of the Secretary of Labor defining the practices of catching, caging, and loading live chickens as practices incidental to raising poultry. Finally, the Board's interpretation ignores decisions of the Court holding that integrated processors of agricultural products who perform activities on a farm that are related to the farm's farming operations are covered by the exemption, despite their motivation to benefit their nonagricultural profit-seeking enterprises. *Maneja v. Waialua Agric. Co.,* 349 U.S. 254, 261-263 (1955); *see Bayside Enters., Inc. v. NLRB,* 429 U.S. 298, 303

n.13 (1977) (discussing interpretative bulletin of Wage and Hour Division of Department of Labor).

Holly's chicken catchers and forklift drivers concededly work on the farms of the independent growers. They catch and cage the chickens and load them on trucks for delivery to market. These functions constitute the harvesting of an agricultural commodity (poultry) and fall within the definition of primary agriculture. 29 C.F.R. §§780.112, 780-118(b) (1994). They also constitute preparation for market. 29 C.F.R. §780.-151(k). Even, assuming, *arguendo*, that the Board is correct that Holly is not acting as a farmer in catching and caging its own chickens, the chicken catchers and forklift drivers are clearly engaged either in primary agriculture or in secondary agriculture as an incident to farming operations. The chickens must be caught before they can be shipped to market.

Although the live haul drivers perform the majority of their work on the roads, they are engaged in delivery to market, a specific secondary agricultural function. They also transport the catchers and forklift operators to and from the farms. These activities are also within the definition of secondary agriculture. *Maneja*, 349 U.S. at 261-262.

The activities of the live haul drivers are incidental to Holly's farming practices. The Board concedes that Holly is a farmer when it breeds poultry and hatches eggs to produce broiler chicks. Although Holly ceases to be a farmer while the chickens are being raised by the independent grower, title to the chickens remains with Holly at all times. When Holly goes on the farms and regains possession of the chickens by catching, caging, loading, and delivering them to market, Holly resumes

its status as a farmer. The Board's adoption of an invariable rule to the contrary eliminates the "delivery to market" exemption for farmers who contract out part of the intermediate raising process, even though the farmer does his own preparation for and delivery to market. The Board's conclusion is contrary to the language of the statute and clear congressional intent.

Holly's chicken catchers, forklift drivers, and live haul drivers satisfy the plain language of §3(f). Petitioners request that the Court reverse the judgment of the court of appeals finding that these employees are not agricultural laborers exempt from coverage of the NLRA.

ARGUMENT

I.

BECAUSE THE BOARD'S INTERPRETATION OF SECTION 3(f) OF THE FLSA IS CONTRARY TO THE PLAIN LANGUAGE OF THAT SECTION, CLEAR CONGRESSIONAL INTENT, THE COURT'S PRIOR INTERPRETATIONS OF THAT SECTION, AND THE SECRETARY OF LABOR'S INTERPRETATIONS OF THAT SECTION, IT IS NOT ENTITLED TO DEFERENCE.

Section 2(3) of the NLRA defines the term "employee" broadly to include "any employee", subject to certain specific exceptions. Because the term "employee" was not given any specific definition by Congress, except by way of limitation, the Court has, over the years, deferred to the Board's development of the parameters of this term. *NLRB v. Town & Country Elec., Inc.*, 64 U.S.L.W. 4022 (U.S. Nov. 28, 1995) (paid union organizers can be employees); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984) (undocumented aliens can be employees); *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170 (1981) (certain confidential employees are employees); *Packard Motor Car Co. v. NLRB*, 330 U.S.

485 (1947) (company foremen are employees); *NLRB v. Hearst Publications Inc.*, 322 U.S. 111 (1944) (independent newsboys are employees); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941) (job applicants are employees).

Where, however, as here, a specific exception to the §2(3) definition of employee is involved, the Board is not free to disregard or whittle away at the exception. Thus, when Congress overruled the *Packard* and *Hearst* decision by amending §2(3) to exclude supervisors and independent contractors, the Board was bound to follow these exceptions. Similarly, the Board has no discretion to ignore Congress' intent to exclude "any individual employed as an agricultural laborer" from the NLRA definition of employee. Nor is the Board free to impose its own definition of an "agricultural laborer." Rather, "[a]nnually since 1946, Congress, in riders to the Appropriations Acts for the Board, has tied the definition of 'agricultural laborer' in §2(3) of the NLRA to §3(f) of the FLSA." *Bayside*, 429 U.S. at 300 n.6. The NLRB has no special expertise or authority in interpreting the FLSA. Instead it is the Secretary of Labor who is charged with interpreting the FLSA.

While the Board is free to choose between conflicting reasonable interpretations of this statutory definition, *Bayside*, 429 U.S. at 302, it is not free to disregard the clearly expressed intent of Congress. *E.g., United Steelworkers of America*, 494 U.S. at 42 ("Because we find that the statute, as a whole, clearly expresses Congress' intention, we decline to defer to OMB's interpretation"); *Dimension Fin. Corp.*, 474 U.S. at 368 ("The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Con-

gress"); *Chevron*, 467 U.S. at 842-843 ("If the intent of Congress is clear, that is the end of the matter"); *American Ship Bldg. Co.*, 380 U.S. at 318 ("The deference owed to an expert tribunal cannot be allowed to slip into a judicial intertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress"). Moreover, once the Court determines the clear meaning of a statute, the principle of *stare decisis* applies and the agency must act consistently with that interpretation. *Lechmere*, 502 U.S. at 537.

The Board, in the decision under review, as well as other decisions interpreting the scope of the agricultural exemption, has blatantly ignored the plain language of the §3(f) definition of "agriculture," the Court's interpretations of that section, the Secretary of Labor's interpretation of that section, and clearly stated congressional intent to exempt the whole field of agriculture, including all practices by a farmer or on a farm as an incident to or in conjunction with such farming practices. The Board's conclusion that Holly's chicken catchers, forklift drivers, and live-haul drivers are not agricultural laborers is not entitled to deference.

II.
CONGRESS EXEMPTED THE WHOLE FIELD OF AGRICULTURE INCLUDING ALL PRACTICES BY A FARMER OR ON A FARM AS AN INCIDENT TO OR IN CONJUNCTION WITH SUCH FARMING PRACTICES.

The intent of Congress in enacting the agricultural exemption is not subject to speculation. It is clearly defined in the language of §3(f) and in the contemporaneous legislative history of §3(f). *See Farmers Reservoir Co. v. McComb*, 337 U.S. 755, 765 (1949). "The exemption was meant to embrace the whole field of

agriculture," and its coverage is "coterminous with the sum of those activities necessary in the cultivation of crops, their harvesting, and their 'preparation for market, delivery to storage or to market or to carriers for transportation to market.' " *Maneja*, 394 U.S. at 260.

The word "agriculture" has two meanings. The primary meaning consists of "farming in all its branches", including, *inter alia*, the raising of poultry and the harvesting of agricultural commodities. The secondary meaning "includes any practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm, incidently to or in conjunction with 'such' farming operations." *Farmers Reservoir*, 337 U.S. at 762-763.

Thus, under the express language of §3(f), an individual will be deemed an agricultural laborer if he falls within any one of the following categories:

(1) He performs primary farming activities;

(2) He performs work on a farm as an incident to or in conjunction with the farming operations of the farm; or

(3) He is employed by a farmer and he performs practices incidental to or in conjunction with his employer's farming operations.

If the individual falls within either category 1 or 2, it is irrelevant whether or not his employer is a farmer. He is considered an agricultural employee because of the nature of his work. Only if the individual does not fall within either category 1 or 2 does the status of his employer become important.

If it were not clear from the language of the statute itself, the contemporaneous legislative history removes all doubt that Congress intended that the definition of an

agricultural laborer would include nonfarmers so long as their work involved primary farming activities or occurred on a farm and was incidental to the farming operations of the farm. During the Senate discussions of the FLSA, Senator Black described the scope of the agricultural exemption as follows:

> The bill specifically and unequivocally excludes certain industries and certain types of business from its scope and effect. It specifically excludes workers in agriculture of all kinds and of all types. There is contained in the measure, perhaps, the most comprehensive definition of agriculture which has been included in any one legislative proposal.
>
> We have placed together in the bill definitions of agricultural work which have been fixed from time to time in other legislative enactments, and in addition to that we have drawn liberally from Mr. Webster's definition of agriculture.

81 Cong. Rec. 7648 (1937).

Despite the comprehensiveness of the agricultural exemption, Senator Tydings became concerned that an unintended "loophole" had been left in the proposed bill, which at that time limited the secondary farming exemption to " 'any practices ordinarily performed by a farmer as an incident to such farming operations.' " 81 Cong. Rec. 7653 (citation omitted). Thus Senator Tydings posed the following scenario:

> What I am thinking of is that quite often the threshing crew is not a part of the farmer's organization. There are men who make a business of going around with threshing and baling machines with enough help to come upon a farm and make a contract with the farmer to thresh his wheat. I should like to know if in such a case it is the Senator's opinion that the threshing crew would be

> exempt, or whether they would be under the operation of the hours provision of the bill.

Id. Senator Tydings explained that it was his understanding that "farming in all its operations, from the time the grain is put into the ground until it leaves the farm, is to be exempted from the provisions of the measure." Senator Tydings expressed concern that the independent wheat thresher would not be exempt. Senator Borah responded that he believed the threshers hypothesized by Senator Tydings would be exempt and pointed out that "[w]heat is not worth very much unless it is threshed." *Id.*

The debates focused on various examples posed by Senators. Senator Overton questioned Senator Black regarding cotton. The following colloquy occurred:

> MR. OVERTON: I assume after the cotton is matured and is being picked the picking would be considered part of an agricultural pursuit, would it not?
>
> MR. BLACK. Certainly, it would be so considered.
>
> MR. OVERTON. I am going just one step further. After the cotton is picked it has to be ginned. Suppose a farmer has a gin on his own farm and gins his own cotton – not the cotton of others – is that a process in the agricultural handling of cotton?
>
> MR. BLACK. As defined by this bill, yes; unquestionably.

81 Cong. Rec. 7657. Senator Black used an example of a farmer erecting a shirt manufacturing operation on his farm as an example of an operation that would not be incidental to agriculture. 81 Cong. Rec. 7658.

Subsequently, the issue raised by Senator Tydings regarding the independent wheat thresher came up again. Senator Bone espoused a position opposite to that taken by Senators Tydings and Borah:

> [I]f a man operates a threshing outfit, and goes from one farm to another farm, such a man is an independent contractor. He is not a farmer. That is not an operation incident to farming, because the man is engaging in a cold-blooded business operation, going from one farm to another, precisely as a huckster goes around and sells tinware to farmers.
>
> . . . . He does not own a farm. He has not any connection with it except to take his threshing apparatus there and thresh the wheat and then get off the land.

81 Cong. Rec. 7569.

In order to clarify this issue, Senator McGill proposed an amendment to add the words "or on a farm" after the word "farmer," as well as the phrase "including delivery to market" after the word "operations." 81 Cong. Rec. 7888. Senator McGill explained the purpose of the amendment as follows:

> [T]he purpose of the amendment is to broaden the definition of "employee" as applied to agriculture. I can readily see how some have construed the language of the bill to mean that one who operates a thrashing machine outfit and employs a crew and is employed by a farmer to thrash his wheat might be included under the provisions of the bill. Likewise, those who are engaged in harvesting and delivering to market might be included.

Id.

Senator McGill was then questioned by Senator George as follows:

MR. GEORGE. Is it the purpose of the amendment to exempt those who thresh grain?

MR. McGILL. Those who thresh grain, who harvest grain and deliver it to market.

MR. GEORGE. Would the amendment also apply to the harvesting of any other crop?

MR. McGILL. It would apply to any commodity produced on a farm.

MR. GEORGE. Would it apply to peanut pickers who pick in the fields?

MR. McGILL. Yes.

MR. GEORGE. And who move peanuts to the market?

MR. McGILL. Yes; that is my understanding.

MR. GEORGE. I should like to ask the Senator from Alabama if that is his interpretation of the amendment.

MR. BLACK. That is my interpretation of the amendment, and it is my belief that the bill as originally drawn covers what is now contained in the language of the amendment; but some Senators who were doubtful about it wished to draw a clarifying amendment.

MR. GEORGE. I am sure it does not in fact do so, because the picking of peanuts and the harvesting of grain in my part of the country are done purely by contract with outsiders, who in a great many cases have no farm interest. What I want to get at is whether, in the opinion of the Senator from Alabama, the language of the amendment of the Senator from Kansas includes any field crop that is

threshed, as in the case of grain, or picked, as in the case of peanuts in the field.

MR. BLACK. Unquestionably.

MR. McGILL. I may say to the Senator from Georgia and other Senators that it is my object to make the language of the amendment broad enough to include all work done on a farm, so long as it is incidental to agricultural purposes.

MR. GEORGE. And so long as it is merely preparatory and necessarily preparatory to the marketing of the field crop. Is that true?

MR. McGILL. That is true; and the language would also include all labor performed in making delivery to market.

81 Cong. Rec. 7888. The amendment was approved and was included in the final version of the bill.

There can be no doubt that had the question been posed to Senator McGill as to whether the amendment would include the catching, caging, and loading of live chickens, his answer would have been "yes." Such activities are indistinguishable from picking cotton, picking peanuts, and threshing wheat. They are "necessarily preparatory to the marketing" of the agricultural product.

III.

HOLLY'S CHICKEN CATCHERS AND FORKLIFT DRIVERS PERFORM ESSENTIAL AGRICULTURAL FUNCTIONS ON FARMS AND ARE CLEARLY AGRICULTURAL LABORERS.

In concluding that Holly's live haul crews were not agricultural laborers, the Board relied solely on its view "that when an employer contracts with farmers for the care and feeding of the employer's chicks, the employer's status as a farmer engaged in the raising of poultry ends with respect to those chicks." (App. 22a). Accepting for the moment the Board's position that Holly is not acting as a farmer when it sends its live haul crews to the farm,[4] the Board's decision does not even purport to address the "or on a farm" language of §3(f). "Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise; here it does not." *Reiter v. Sonotone Corp.*, 442 U.S. 329, 339 (1979). Congress added the phrase "or on a farm" to §3(f) specifically for the purpose of exempting a nonfarmer who was performing work on a farm incidental to the farming operations of that farm. *Farmers Reservoir*, 337 U.S. at 767. Nor did the Board consider whether the chicken catchers and forklift drivers are engaged in primary agriculture. "If an employee is employed in [primary agricultural activities], he is engaged in agriculture regardless of whether

[4] Although the Court has approved this conclusion as it applies to feed mill drivers who deliver poultry feed to the independent growers' farms, *Bayside* 429 U.S. at 303-304, it does not apply once Holly begins catching and cooping the chickens that it initially raised before turning them over to the independent grower for the maturation process. As is discussed at Section IV B of this brief, Holly does function as a farmer in catching, caging, loading and delivering its own chickens to market.

he is employed by a farmer or on a farm." 29 C.F.R. §780.105(b). Clearly, even assuming, *arguendo*, that Holly is not acting as a farmer at the time that it catches and cages the chickens, that is not dispositive.

A. The Chicken Catchers And Forklift Drivers Perform Work On A Farm As An Incident To Or In Conjunction With Farming Operations.

Because the work of the chicken catchers and forklift drivers is performed on the farms of the independent growers, these individuals are exempt agricultural laborers if their work is performed "as an incident to or in conjunction with" the farming operations of the independent grower. Although the Board did not address this issue in the decision under review, it states in its Brief in Opposition to the Petition for Certiorari that "the activities of the live haul workers are incidental, not to the operations of the independent growers, but instead to petitioners' poultry slaughtering operation." (Brief at 23). This rationale has been followed by the Board in other decisions both prior and subsequent to the decision under review.

In *Imco Poultry, Division of International Multifoods Corp*, 202 N.L.R.B. 259, 260-261 (1973), the Board stated:

> As the service crew employees involved herein are engaged in handling and transporting chicks on the farms of independent growers only after Respondent's farming operations have ended, these employees cannot be performing practices incident to, or in conjunction with, Respondent's farming operations. More accurately, they are engaged in nonfarming operations which are incident to, or in conjunction with, a separate and distinct business

> activity of the Respondent, i.e., shipping and marketing. Furthermore, since the activities of the employees named herein on the growers' farms are all related to transportation and the employees have no business relationship with the independent farmers, we conclude that the employees' activities were not incidental to the independent farmers' poultry raising operations.

In *Draper Valley Farms, Inc.*, 307 N.L.R.B. 1440 (1992) the Board held that the employer's "chicken catchers are engaged in activity incidental to a separate and nonfarming business activity of the Employer, and thus do not fall within the agricultural labor exemption contained in Section 2(3) of the National Labor Relations Act, 29 U.S.C. §152(3)." Relying on *Imco Poultry*, the Board asserted that at the time that the chicken catchers begin their work on the farms of the independent growers, the poultry raising activities of both their employer and the independent grower have "concluded." 307 N.L.R.B. at 1440.

The Board's position that the activities of catching and caging live chickens on the farms of the independent growers are not incidental to the farming operations of either Holly or the independent growers is irrational, contrary to clearly expressed congressional intent, and contrary to precedents of the Court and the Secretary of Labor. The Board concedes that Holly is a farmer engaged in the primary agricultural function of raising poultry up until such time as it sends the chicks to the farms of the independent growers. Thus, the Board found that Holly's hatchery employees, egg haulers, and pullet haulers are agricultural employees (App. 21a-22a, 43a). The Board apparently further concedes that the activities of the independent grower in feeding, caring for, and raising the chickens are primary agricultural

tasks. Nevertheless, according to the Board, the activities of catching, caging, and loading the chickens are not incidental to the poultry raising operations of either Holly or the independent growers.

Catching, caging, and loading live chickens that have been raised first by Holly and subsequently by the independent growers are tasks that are clearly incidental to, or in conjunction with, someone's (Holly or the independent grower) poultry raising operations. The catching, caging, and loading process does not involve any changes to the natural state of the chickens. The only purpose of these functions is to enable the chickens to be delivered to market. If the chickens are not caught, they will presumably remain on the farm until such time as they die either as a result of accident, malnutrition, or old age. Even the small farmer who raises chickens for his own table must catch his chickens before he can eat them.

The language of §3(f) expressly includes "preparation for market" as an activity that is incidental to the farm's farming operations. Moreover, the Secretary of Labor has interpreted "preparation for market" as including "culling, grading, cooping, and loading" of poultry. 29 C.F.R. §780.151(k).

The Board's position that Holly is acting as an incident to its processing operations in sending out its live haul crews to the farms, even if true, is irrelevant. Nowhere in the language of the exemption, or in the legislative history, is there any suggestion that the activity being performed on a farm must be "solely" or "exclusively" incidental to the farming operations of the farm. An activity may be incidental to a multitude of other operations. The independent wheat thresher cited in the legislative history is obviously acting as an incident to

his own business operations, as well as the farming operations of the farmer. The Board's strained interpretation of what is incident to farming operations effectively renders the "on a farm" language in §3(f) meaningless. Under the Board's view, if the independent grower does his own catching, caging, and loading of chickens, he is exempt as a farmer.[5] However, if anyone else performs these activities, he is not exempt because he is acting in the interest of some other business interest. The independent wheat thresher, peanut picker, and cotton picker are not exempt inasmuch as their motivation is to advance their own business interests. Yet, the Court has clearly observed that "the wheat threshing companies, even though they were separate enterprises, were included in the exemption because their work was incidental to farming and was done on the farm." *Farmers Reservoir,* 337 U.S. at 767.

Recognizing the untenability of this position, the Board asserts in its Brief in Opposition that the "on a farm" exemption is limited to independent business enterprises that do nothing but thresh wheat, pick peanuts, pick cotton, etc. (Brief at 24). According to the Board, if the independent business enterprise has any other business operations the exemption does not apply. In support of this proposition, the Board cites to *Farmers Reservoir,* 337 U.S. at 767, where the Court stated:

> On the floor of the Senate it was objected that [the original language of §3(f)] would exclude the threshing of wheat or other functions necessary to

[5] *See Domsea Farms, Inc.,* 211 N.L.R.B. 832 (1974) (employees of commercial fish farm who "harvest" coho salmon "by killing them in freezing water, putting them in tubs, and transferring them to an outside contractor's processing plant for dressing, packaging, and distribution for market" are agricultural laborers).

> the farmer if those functions were not performed by the farmer and his hands, but by separate companies organized for and devoted solely to that particular job. (Footnote omitted).

Petitioner is unaware of any Board decision in which this rationale has ever been stated. Thus, it cannot be used to justify the Board's decision. Moreover, there is no indication in the legislative history that Congress' discussion of a company that went from farm to farm threshing wheat was intended to limit the exemption to independent companies that did nothing else, anymore than it was intended to limit the exemption to wheat threshers. The examples used by the Senators were intended to illustrate, not limit, the exemption. The Court's use of the word "solely" in *Farmers Reservoir* appears intended to highlight the fact that even if the independent company had no farming operations whatsoever and was organized as a purely separate business enterprise, its employees would nevertheless be exempt if they performed functions on the farmer's farm that were necessary to the farmer. Indeed, in *Bayside,* the Court recognized that "[a]n employer's business may include both agricultural and nonagricultural activities." 429 U.S. at 301. The interpretation of the Board's counsel represents nothing more than an attempt to usurp major policy decisions more properly made by Congress.

The Board's narrow view of the phrase "as an incident to or in conjunction with such farming operations" focuses on the ultimate motivation of the Company to market processed chicken at a profit, a wholly irrelevant consideration[6], and is inconsistent with the Court's

[6] This is the same motivation behind Holly's hatchery operations. These operations have no independent purpose other than

[footnote continued]

decision in *Maneja,* where the Court addressed the agricultural status of employees of a "corporation, which is engaged in the growing, harvesting and processing of sugar cane" at its ten thousand acre plantation. The Court described the employer's operations as "the agricultural analogue of the modern industrial assembly line." 349 U.S. at 256. The company planted, grew, cultivated and harvested sugar cane. It loaded the sugar cane on railroad cars and transported the freshly cut sugar cane over portable tracks to the processing plant, where it processed the sugar cane into raw sugar and molasses. It then stored the sugar and molasses in warehouses on the plantation and subsequently shipped the sugar and molasses throughout the United States. In holding that the railroad workers who transported the sugar cane to the processing plant were agricultural employees, the Court specifically rejected the proposition that the Act drew "a distinction between large and small farms or between mechanized and non-mechanized agriculture." 349 U.S. at 261. It also rejected the contention that Waialua was not entitled to the exemption because it was delivering the sugar cane to its own processing mills. 349 U.S. at 262-263.

Clearly, the ultimate motivation of Waialua was to market the processed sugar and molasses for a profit. In transporting the sugar cane to its processing plant, it was acting in furtherance of its processing and marketing operations. Nevertheless, it was also acting as "an incident to or in conjunction with" the farming activity of growing sugar cane.

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providing chickens to be processed and marketed, hopefully at a profit. Yet, the Board found that the hatchery employees were agricultural laborers.

In *Bayside,* the Court cited with approval the interpretative bulletin of the Wage and Hour Division of the Department of Labor regarding "contract arrangements for raising poultry." 429 U.S. at 303. This bulletin, reads in pertinent part:

> Feed dealers and processors sometimes enter into contractual arrangements with farmers under which the latter agree to raise to marketable size baby chicks supplied by the former who also undertake to furnish all the required feed and possibly additional items. Typically, the feed dealer or processor retains title to the chickens until they are sold. Under such an arrangement, the activities of the farmers and their employees in raising the poultry are clearly within section 3(f). The activities of the feed dealer or processor, on the other hand, are not "raising of poultry" and employees engaged in them cannot be considered agricultural employees on that ground. Employees of the feed dealer or processor who perform work on a farm as an incident to or in conjunction with the raising of poultry on the farm are employed in "secondary" agriculture (see §§ 780.137 et seq, and *Johnston v. Cotton Producers Assn.*, 244 F.2d 553).

29 C.F.R. §780.126.

This bulletin of the Department of Labor clearly contemplates that the processor's employees who work on the farms of the independent growers can be engaged in agriculture. In fact, the case cited by the Department of Labor, *Johnston v. Cotton Producers Association,* 244 F.2d 553 (5th Cir. 1957), involved an employee of a retail store who caught, cooped, and loaded on trucks chickens that were being raised by independent farmers. After being loaded, the chickens were transported to

processing plants. The Fifth Circuit held that this work was agricultural:

> It is, of course, the nature of the employee's work rather than the nature of the employer's business that brings him within or excludes him from the benefits of the Act. . . . Substantially all of [the employee's] work was done as a part of or in connection with the preparation for market and the delivery to market of poultry raised on farms. To the extent that this work was done on farms it was agricultural.

244 F.2d at 555 (citations omitted).

The phrase "incident to or in conjunction with such farming operations" was intended to exclude activities performed by a farmer or on a farm that were unconnected to the farming activities of either the farmer or the farm. The example used in the legislative history was of a farmer who operated a shirt factory on his farm. The shirt factory would clearly be unrelated to the farming activities of either the farmer or the farm. Congress did not intend to exclude activities related to the agricultural activites of the farm simply because the employer of the farm workers was motivated by some independent goal to make a profit.

Holly's chicken catchers and forklift operators are clearly acting as an incident to or in conjunction with the farming activites of either Holly Farms or the independent grower. The Board's conclusion to the contrary is not entitled to deference and should be rejected.

B. The Chicken Catchers And Forklift Drivers "Harvest" Live Chickens And Are Engaged In Primary Agriculture.

Under the plain language of §3(f), harvesting of agricultural commodities constitutes primary farming. The Secretary of Labor has held that the term "harvesting" includes reducing an agricultural commodity to possession. 29 C.F.R. §780.118(b). He has further held that "the term [agricultural commodity] includes domesticated animals and some of their products such as . . . eggs . . . ." 29 C.F.R. §780.112. The Secretary also views harvesting as including "transportation to a concentration point on the farm." 29 C.F.R. §780.118(b). Clearly, the chicken catchers, who catch and cage live chickens, thereby reducing them to possession, are engaged in harvesting. Similarly, the activities of the forklift driver in transporting the live chickens to the live haul truck, which is parked on the farm, constitute harvesting.[7] The Board's position that §3(f) includes harvesting of crops, but not animals such as poultry, *Draper Valley Farms, Inc.*, 307 N.L.R.B. 1440 (1992), is contrary to the plain language of the statute and is not entitled to deference.

It might be argued that Congress would not have added the "on a farm" language to §3(f) if harvesting was already included within the definition of primary agriculture. In fact, Senator Black was quite vocal that the preexisting language was sufficient to cover the independent wheat thresher and that the amend-

[7] Contrary to the assertion of the panel majority in the court of appeals (Pet. App. 46), Holly did not concede that the chicken catchers and forklift drivers were not engaged in primary agriculture. Holly's position was that they performed essential agricultural functions on a farm and came with the language and intent of §3(f).

ment was unnecessary. Because some senators disagreed, the amendment was added to make the intent of Congress clear. Senator Black's original interpretation, however, is supported by the plain language of §3(f).

IV.
HOLLY'S LIVE HAUL DRIVERS PERFORM DELIVERY TO MARKET AS AN INCIDENT TO OR IN CONJUNCTION WITH HOLLY'S FARMING ACTIVITIES AND ARE EXEMPT AGRICULTURAL LABORERS.

A. The Live Haul Drivers Are Engaged In Delivery To Market And Other Practices Incidental To Farming Operations.

Section 3(f) specifically defines "delivery to storage or to market" as a secondary farming practice. In *Maneja,* the Court held that a farmer's employees who delivered sugar cane to the farmer's processing plant were engaged in "delivery to market." The Court further held that "the transportation of farm implements, supplies and field workers to and from the fields" is a secondary farming practice. 349 U.S. at 261-262.

The live haul drivers transport the chicken catchers and forklift drivers to and from the fields and deliver the live chickens to Holly's processing plants. Thus, these drivers are engaged in secondary farming practices and are agricultural laborers if their activities are incidental to Holly's farming operations.

B. Holly Is Acting As A Farmer From The Time It Sends Its Live Haul Crews To The Farms Until Such Time As The Live Chickens Are Delivered To The Processing Plants.

Holly produces hatching eggs and breeds and hatches chicks. The hatched chicks are subsequently sent to contract growers to be raised to the age of forty-nine days. Holly retains title to the chicks while they are in the hands of the contract grower, and provides food, supervision, and other services to the grower. When the chickens reach the age of forty-nine days, Holly sends its live haul crews to the farms of the growers, where it catches, cages, and loads the live chickens on the live haul trucks and delivers the chickens to the processing plants.

It is undisputed that Holly is acting as a farmer in producing hatching eggs and breeding and hatching chicks. According to the Board, however, Holly ceases for all time to be a farmer once it delivers the chicks to the independent growers. Although the Board's position that Holly is not acting as a farmer while the chicks are in the possession and control of the contract growers has been approved as reasonable, its position that Holly is not acting as a farmer when it catches, cages, and loads the chickens onto trucks and delivers them to market is irrational and contrary to the intent of Congress.

In *Bayside,* the Court addressed the agricultural status of feed haul drivers of a vertically integrated poultry company whose operations were substantially similar to those of Holly. The drivers delivered feed from the employer's feed mills to the independent growers. The Court recognized that because the drivers did not work "on a farm", their status turned on "whether their activity should be regarded as work performed 'by a farmer'."

429 U.S. at 301. The Court held that although the issue was debatable, the Board acted reasonably in rejecting "the argument that all of the activity on a contract farm should be regarded as agricultural activity of an integrated farmer such as Bayside." 429 U.S. at 302. The Court noted that the contract farmer, not Bayside's employees, stored the feed and used it to feed the chicks and that the operation of a feedmill was not an agricultural operation. 429 U.S. at 303.

Bayside clearly does not control the disposition of this case. The Bayside drivers delivered feed, a processed product, to the independent farmers. Bayside did not have control of the chicks at the time the feed was delivered to the growers, and its employees were not involved in feeding the chicks. The independent growers were in possession of the chicks and were responsible for feeding and caring for the chicks. Thus, Bayside was not acting as a farmer at the time that its feed haul drivers were delivering feed to the growers.

Holly's status in catching, caging, loading, and delivering chickens to market is fundamentally different from Bayside's status in delivering poultry feed to the independent growers. Holly not only has title to the chickens, but it also retakes possession and control of the chickens from the independent grower. Its employees actually perform the agricultural tasks of catching, caging, loading, and delivering to market. In these circumstances, it is apparent that it is Holly, not the independent grower, which is acting as a farmer.

The Board's position that the employer's status as a farmer ends when it turns the chicks over to the independent growers is reasonable while the chicks are in the possession and control of the independent growers. It is not reasonable, however, to the extent that

it constitutes an invariable rule that the employer can never resume its status as a farmer. Holly is a farmer in producing hatching eggs and breeding and hatching chicks. It is not a farmer while the chicks are in the possession and control of the independent farmer. Holly resumes its status as a farmer when it sends its live haul crews to the farms to regain possession and control of the live chickens to which it holds title and to deliver them to market. It is the character of Holly's activities, not those of the independent grower, which make Holly's live haul drivers agricultural laborers. *Coleman v. Sanderson Farms, Inc.*, 629 F.2d 1077, 1081 (5th Cir. 1980).[8]

Because Holly's live haul drivers are performing delivery to market of live poultry owned and initially raised by Holly, they are exempt agricultural laborers. The Board's conclusion to the contrary eliminates the "delivery to market" exemption for farmers who contract out part of the growing process, a result that is contrary to the language of the statute, as well as congressional intent.

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[8] Unlike the Fifth Circuit's decision in *Sanderson Farms*, the Eighth Circuit's decisions in *NLRB v. Hudson Farms, Inc.*, 681 F.2d 1105 (8th Cir. 1982), *cert. denied*, 459 U.S. 1069 (1982), and *Valmac Industries, Inc. v. NLRB*, 599 F.2d 246 (8th Cir. 1979), which hold that live haul drivers are equivalent to the feed haul drivers in *Bayside*, contain no significant analysis of the facts in *Bayside* or of §3(f).

CONCLUSION

Holly's chicken catchers and forklift drivers perform essential farming activities on farms and satisfy the plain language of §3(f), whether or not Holly is acting as a farmer at the time of these activities. The Board's position, however, that Holly is not acting as a farmer is irrational and not entitled to deference. Holly acts as a farmer in producing hatching eggs and breeding and hatching chicks. Although it contracts out the raising process to independent growers, it retains title to the chicks at all times. When it sends its live haul crews out to the farm to catch, cage, and deliver its chickens to market, Holly resumes its status as a farmer. Thus, all of these employees, including the live haul drivers, are agricultural laborers.

Petitioners respectfully request that the judgment of the court of appeals be reversed in pertinent part.

Dated this 21st day of December 1995.

Respectfully submitted,

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